

Montana Water Court
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FILED
03/31/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0622-R-2022
Lambert, Kathryn
12.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANTS: Oliver Warden; Carmen I. West; Robert B. West

CASE 43B-0622-R-2022
43B 37051-05

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Claim 43B 37051-05 appeared in the Preliminary Decree with the following remarks:

THE POINT OF DIVERSION MAY BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE NESWNE SEC 03 TWP 06S RGE 09E PARK COUNTY. SEE DNRC MEMORANDUM DATED 05/26/1987.

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT WERE FILED BY DIFFERENT PARTIES WHO CLAIM OVERLAPPING PLACES OF USE. 43B 37051-05, 43B 194192-00, 43B 194193-00, 43B 194194-00, 43B 194337-00, 43B 194338-00, 43B 194339-00, 43B 194340-00, 43B 194341-00, 43B 194342-00, 43B 194388-00, 43B 194390-00, 43B 194391-00.

These remarks were not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA. Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark and the Court can provide the claimants an opportunity to file additional information or evidence. On February 10, 2023 Robert West filed a response providing corrected information for the place of use clarification remark, and information about the ditch name/point of diversion legal description issue. As the ditch name/point of diversion information did not jibe with the February 25, 2021 aerial photograph prepared by the DNRC, clarification was requested by the Court. On March 9, 2023 the Wests filed a response confirming the point of diversion legal description to be used for Mill Creek Flat Ditch. On March 13, 2023 Oliver Warden filed a response stating his agreement. On March 14, 2023 the Wests filed a response confirming the point of diversion legal description. The responses are viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. The Preliminary Decree states that the ditch name is MILL CREEK FLAT DITCH and the point of diversion legal description is the NENENW section 3, T6S, R9E, PARK. As shown

on the February 25, 2021 DNRC marked aerial photograph, this is the legal description for Upland Ditch. The legal description for the point of diversion should be changed to NESWNE section 3, T6S, R9E, PARK. The point of diversion issue remark should be removed as addressed and resolved.

2. The Preliminary Decree includes the following clarification remark on the place of use: THE PLACE OF USE IS LOCATED IN TRACT 3A OF CERTIFICATE OF SURVEY NO. 25B, PARK COUNTY. This clarification remark text should be corrected to: THE PLACE OF USE IS LOCATED IN LOTS 22 AND 23 OF BLUE RIBBON MANOR, PARK COUNTY. The overlapping place of use/ownership issue remark should be removed as addressed and resolved.

3. The Preliminary Decree also includes the following notice remark:

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 09/28/2017 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY MCCRUM PROPERTIES NO 2 LLC.

McCrum Properties LLC is the predecessor of Oliver Warden, so the ownership notice remark is no longer pertinent and should be removed as having served its notice purpose.

CONCLUSION OF LAW

The claimants' responses are sufficient to resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service via USPS Mail:

Oliver Warden
3 Cascade Ln
Livingston, MT 59047-8815

Carmen I. West
636 SW Dogwood Rd
Port Orchard, WA 98367-8313

Robert B. West
6881 Legalla Lane
Las Vegas, NV 89156-6039

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 37051-05 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: ROBERT B WEST
636 SW DOGWOOD RD
PORT ORCHARD, WA 98367 8313

CARMEN I WEST
636 SW DOGWOOD RD
PORT ORCHARD, WA 98367 8313

OLIVER WARDEN
3 CASCADE LN
LIVINGSTON, MT 59047 8815

Priority Date: APRIL 1, 1883
Type of Historical Right: DECREED
Purpose (use): IRRIGATION
Irrigation Type: FLOOD
***Flow Rate:** 29.18 GPM
THIS RIGHT IS AN UNDIVIDED ONE-EIGHTH SHARE.
***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.
Climatic Area: 4 - MODERATELY LOW
Maximum Acres: 10.20
Source Name: MILL CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWNE	3	6S	9E	PARK

Period of Diversion: MAY 1 TO OCTOBER 31
Diversion Means: HEADGATE
Ditch Name: MILL CREEK FLAT DITCH
Period of Use: MAY 1 TO OCTOBER 31
Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	10.20		SESESE	12	5S	8E	PARK
Total:	10.20						

THE PLACE OF USE IS LOCATED IN LOTS 22 AND 23 OF BLUE RIBBON MANOR, PARK COUNTY.